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In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

SUN-DIAMOND GROWERS OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES DEPARTMENT OF JUSTICE AS AMICUS CURIAE

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QUESTION PRESENTED

Is the requirement in 18 U.S.C. 201(c)(1)(A) that a thing of value be given "for or because of any official act" satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?

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INTEREST OF THE UNITED STATES DEPARTMENT OF JUSTICE

This prosecution arises under the federal gratuities statute, 18 U.S.C. 201(c), and was brought by Independent Counsel Donald C. Smaltz pursuant to the Ethics in Government Act of 1978, 28 U.S.C. 591 *et seq.* (1994 & Supp. II 1996). The Ethics in Government Act of 1978 provides that "[n]othing in [the Act] shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding." 28 U.S.C.

597(b). Other than in prosecutions conducted by an Independent Counsel, the United States Department of Justice is responsible for the enforcement of the gratuities statute. The Department therefore has a substantial interest in the resolution of the issue of law presented in this case.

STATEMENT

1. Section 201(c)(1)(A) of Title 18 U.S.C. establishes criminal penalties of up to two years' imprisonment for any person who

> otherwise than as provided by law for the proper discharge of official duty * * * directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, *for or because of any official act performed or to be performed* by such public official, former public official, or person selected to be a public official.

18 U.S.C. 201(c)(1)(A) (emphasis added). The statute defines the term "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity." 18 U.S.C. 201(a)(3). The term "public official" is defined to include any "officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof." 18 U.S.C. 201(a)(1).

Although Section 201(c) does not contain the word "gratuity," the courts of appeals have repeatedly used that term to describe the payments forbidden by Section 201(c), and to distinguish the Section 201(c) offenses from the bribery offenses defined by 18 U.S.C. 201(b). See, *e.g.*, Pet. App. 7; *United States* v. *Brewster*, 506 F.2d 62, 68-72 (D.C. Cir. 1974); *United States* v. *Bustamante*, 45 F.3d 933, 935 (5th Cir.), cert. denied, 516 U.S. 973 (1995); *United States* v. *Niederberger*, 580 F.2d 63, 68 (3d Cir.), cert. denied, 439 U.S. 980 (1978). Section 201(b) establishes criminal penalties of up to 15 years' imprisonment for any person who "directly or indirectly, corruptly gives, offers or promises anything of value to any public official * * * with intent * * * to influence any official act." 18 U.S.C. 201(b)(1).[1]

2. Independent Counsel Donald C. Smaltz obtained a nine-count indictment against respondent Sun-Diamond

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[1] The provision of things of value to federal officers and employees is subject to various criminal provisions in addition to those included in Section 201. See, *e.g.*, 18 U.S.C. 203 (compensation to Members of Congress and other federal officers and employees in matters affecting the government); 18 U.S.C. 209 (supplementation of salaries of federal officers and employees); see generally 18 U.S.C. 201-225 (bribery, graft, and conflicts of interest).

Additional restrictions on the receipt of things of value by federal officers and employees are imposed by 5 U.S.C. 7353 and (with respect to Executive Branch officials) by regulations promulgated thereunder by the Office of Government Ethics. See 5 C.F.R. 2635, Subpt. B. Those regulations provide as a general rule, subject to specified exceptions, that federal employees are prohibited "from soliciting or accepting any gift from a prohibited source or given because of the employee's official position." 5 C.F.R. 2635.201. The term "prohibited source" is defined to include persons seeking official action by, doing business or seeking to do business with, or conducting activities regulated by the employee's agency, as well as persons whose interests may be substantially affected by the individual employee's performance or nonperformance of his official duties. 5 C.F.R. 2635.203(d); see 5 U.S.C. 7353(a). Those regulations define the obligations of federal employees and do not purport to govern the conduct of private donors.

Growers, Inc., a large agricultural cooperative. At issue in this case is respondent's conviction under Count I, which alleged that respondent had given unlawful gratuities to then-Secretary of Agriculture Mike Espy. Count I charged respondent with giving Espy tickets to the 1993 U.S. Open Tennis Tournament worth $2,295, luggage worth $2,427, meals worth $665, and a framed print and crystal bowl worth $524. Pet. App. 4.[2]

At the time of the gratuities alleged in Count I, Richard Douglas was employed by respondent as a senior vice president. Pet. App. 36. Douglas had attended college with Espy, and the two had remained close friends during the ensuing years. *Id.* at 2. Although the gifts in question were transferred to Espy through Douglas, the indictment alleged that respondent had reimbursed Douglas for the gifts, treating them as business expenses. *Id.* at 4.

The indictment identified two issues in which respondent had an interest in favorable action by the Secretary of Agriculture at the time when the alleged

[2] Count II of the indictment alleged a separate violation of Section 201(c)(1)(A). The jury acquitted respondent on that count. Pet. App. 4 n.1. Counts III and IV alleged violations of the federal wire fraud statute, 18 U.S.C. 1343 and 1346. Pet. App. 14. Counts V through IX alleged violations of the Federal Election Campaign Act of 1971, 2 U.S.C. 441b(a) and 441f. Pet. App. 14. The jury found respondent guilty on Counts III through IX. *Ibid.* The court of appeals affirmed the convictions on Counts III through IX but vacated the sentence imposed by the district court and remanded the case for resentencing. *Id.* at 31. Counts II through IX are not at issue in this Court. Respondent filed a cross-petition challenging the court of appeals' affirmance of the convictions on Counts III and IV. The Court denied that cross-petition. See *Sun-Diamond Growers of California* v. *United States*, 119 S. Ct. 409 (1998).

gratuities were bestowed. Pet. App. 3. First, respondent sought regulatory action that would have increased its members' chances of obtaining grants under the market promotion program, a program administered by the Department of Agriculture pursuant to statutory authority as a means of assisting U.S. agricultural exports. *Ibid.*; see 7 U.S.C. 5623 (1994 & Supp. II 1996). Second, respondent wanted then-Secretary Espy's help in persuading the Environmental Protection Agency to delay or reject a proposed phase-out of methyl bromide, a pesticide used by some of the growers who belonged to respondent's member cooperatives. Pet. App. 4.

3. a. The district court denied respondent's motion to dismiss the indictment. Pet. App. 35-66. With respect to Count I, respondent contended that the indictment was deficient because it "d[id] not allege that [respondent] provided things of value to reward Secretary Espy for a specific act he had already performed or was already committed to perform." *Id.* at 38. The district court framed the question before it as "whether, with respect to appointed officials, the gratuity statute requires the indictment to allege a nexus between the provision of things of value and a specific official act performed or committed to be performed by the appointed official." *Id.* at 41-42.

The court held that such a nexus was not required. "Rather," the court stated, "it is sufficient for the indictment to allege that the provider of the gratuity has matters within the purview of the official receiving the gratuity, and that the gratuity be provided simply because of the official's position, in appreciation of the relationship, or in anticipation of its continuation." Pet. App. 42 (internal quotation marks, brackets, emphasis, and ellipsis omitted). The court acknowledged that a

closer connection between a payment and an official act might be required in a prosecution of an elected official (see *id.* at 42-44), but it concluded that "in cases involving appointed officials, such as the present matter, it is sufficient for the indictment to allege that Secretary Espy received things of value because of his status as Secretary of the Department of Agriculture," *id.* at 44.

b. Consistent with its ruling on the motion to dismiss the indictment, the district court repeatedly instructed the jury that the government was not required to prove a nexus between the alleged gratuities and any specific official action, and that respondent could properly be convicted based on proof that the gifts were motivated by Espy's "position." Thus, the jury was instructed that "to prove the offense of illegal gratuity, the government must prove that [respondent] knowingly and willingly gave, offered or promised a thing of value to Secretary of Agriculture, Mike Espy, for or because of his official position." Pet. App. 83. See also *id.* at 84 ("the government [must] prove that the gratuity was given because of the public official's position"); *ibid.* ("The gratuity statute makes it a crime for a person or company to knowingly and willingly give a public official a thing of value because of his official position whether or not the giver or receiver intended that particular official's acts be influenced."); *ibid.* ("The essence of the crime is the official's position of [sic] as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return."); *id.* at 85 (Section 201(c) "does not require that [respondent] gave the gratuities with the intent to influence Secretary Espy. It is sufficient if [respondent] provided Espy with unauthorized compensation simply because he held public office."); *id.* at 86 ("In

order for you to convict [respondent] of violating the gratuity statute, you must find beyond a reasonable doubt that [respondent] gave the gifts to Mr. Espy for or because of Mr. Espy's official government position and not solely for reasons of friendship or social purpose."); *id.* at 87 ("The government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all.").

Other portions of the instructions indicated that respondent's status as an entity regulated by the Department of Agriculture was integral to the application of the gratuities statute. Thus, the court stated that

> the government must prove that the gratuity was knowingly and willingly given for or because of an official act performed or to be performed by the Secretary of Agriculture, Michael Espy. That means that the government must prove that [respondent] knowingly and willingly gave the gratuities, at least in part, because of the Secretary's position in appreciation of [respondent's] relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official.

Pet. App. 87. The jury was further instructed that "[w]ith respect to official acts, the government has to prove that [respondent] gave knowingly and willingly Secretary Espy things of value while it had issues before the United States Department of Agriculture." *Id.* at 88. The jury found respondent guilty on Count I and Counts III through IX of the indictment.[3]

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[3] At the close of the government's case, respondent moved for judgment of acquittal with respect to all nine counts of the

4. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded the case for a new trial on Count I and for resentencing on Counts III through IX. Pet. App. 1-31. With respect to Count I of the indictment, respondent contended that (a) the indictment should have been dismissed for failure to allege a nexus between the gifts and any specific official act, and (b) the jury instructions were defective because they permitted a verdict of guilty based solely on a finding that the gifts were motivated by Espy's official position. *Id.* at 4-5. The court of appeals rejected respondent's challenge to the indictment but agreed with its claim of instructional error. *Id.* at 5. It therefore reversed the conviction on Count I. *Id.* at 5-13.

a. In addressing respondent's challenge to the jury instructions, the court of appeals stated that "[t]o satisfy the criminal intent requirement embodied in the phrase 'for or because of any official act,' the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts." Pet. App. 7. The court stated as well that "if Douglas furnished Espy with gifts merely to win his generalized sympathy for [respondent], those gifts would not be illegal gratuities, unless the jury could find that Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future." *Id.* at 10. The court concluded

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indictment. See *United States* v. *Sun-Diamond Growers of California*, 964 F. Supp. 486, 488 (D.D.C. 1997). The district court denied that motion. *Ibid.* After the jury returned its verdict, respondent renewed its motion with respect to Counts III through IX, but not with respect to Count I. *Ibid.* The district court denied the renewed motion for judgment of acquittal. *Id.* at 494.

that the jury instructions given in this case failed to satisfy that standard:

> Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands—evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before his donee, gifts motivated by the latter's position will usually also be motivated by a desire to reward or elicit favorable official action. But the terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.

Id. at 12-13. Because the court concluded that "the charge failed to give the jury an adequate understanding of the issues," and that "the error cannot be called technical or harmless," it "reverse[d] and remand[ed] for a new trial on Count I." *Id.* at 13.

b. The court of appeals rejected respondent's contention that the indictment should have been dismissed because it failed to allege that the gratuities in question were earmarked for particular official acts. The court explained: "That an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute—as long as the jury is required to find the requisite intent to

reward past favorable acts or to make future ones more likely." Pet. App. 13-14.[4]

5. The court of appeals denied the Independent Counsel's petition for rehearing and suggestion for rehearing en banc. Pet. App. 32-33. Judge Wald issued an opinion concurring in the denial of rehearing en banc. She explained:

> I read the panel decision as requiring only that the gifts be tied to some future acts by the official, even if those acts are neither specified nor even known at the time of the gift; this case does not hold that the prosecutor must establish that particular gratuities were given to influence particular official acts. Nonetheless, I admit that the main distinction the panel draws between gifts motivated by an official's "position" and gifts motivated by an official's "acts" eludes me altogether. I suppose it is conceivable that someone might give gifts to a high official simply to create the impression that he is a "big shot" or "insider," without regard to how the official wields his power. But this hardly seems likely in the case of a regulated entity. Much more likely is the assumption that inherent in an official's "position" is his capacity to perform regulatory acts which will affect the gift-giver.

Id. at 34.

[4] The court of appeals also held that the district court had erred in sentencing respondent on Counts III through IX by (a) departing upward from the fine range established by the Sentencing Guidelines (see Pet. App. 26-30) and (b) imposing reporting requirements on respondent's member cooperatives (see *id.* at 30-31). The court therefore vacated the sentence imposed by the district court and remanded for resentencing. *Id.* at 31. The petition for a writ of certiorari does not challenge that aspect of the court of appeals' decision, and the question on which this Court granted certiorari does not encompass any sentencing issue.

SUMMARY OF ARGUMENT

1. Section 201(c)(1)(A) prohibits payments to a public official "for or because of any official act," and it therefore does not reach payments motivated by an official's position standing alone. It is possible to conceive of situations in which a donor may give things of value to a government officer because of the recipient's official status, while remaining indifferent as to the manner in which the recipient's official duties are performed. Absent any connection between a gift and the manner in which governmental power or influence is exercised, the gift is not properly characterized as one made "for or because of any official act." 18 U.S.C. 201(c)(1)(A).

2. Section 201(c)(1)(A) does not, however, require proof of a nexus between a gift to a public official and a specifically identified official act. If a gift to a public official is motivated at least in part by a desire to reward or influence the recipient's performance of his governmental responsibilities, or to generate a reservoir of goodwill that may influence future acts, the gift is properly characterized as one made "for or because of any official act performed or to be performed by" the official, 18 U.S.C. 201(c)(1)(A), whether or not the donor has a particular act in mind at the time the gift is made. Such a gift directly implicates the core concern underlying the various federal bribery and conflict-of-interest laws—*i.e.*, "[t]he principle * * * that a public servant owes undivided loyalty to the Government." H.R. Rep. No. 748, 87th Cong., 1st Sess. 3 (1961). Thus, where a gift to a public official is moti-

vated by the recipient's capacity to exercise governmental power or influence in a manner favorable or unfavorable to the donor, the gift is proscribed by Section 201(c)(1)(A), regardless of whether the gratuity is linked to any specific official act.

3. As with any element of a criminal offense, the defendant's mental state may be proved by circumstantial as well as by direct evidence. Where a thing of value is given to a government official who has the authority to act in matters affecting the donor's interests, the jury should generally be permitted to infer, based on that relationship alone, that the gift was made "for or because of" the potential future exercise of official power or influence. Although the jury is not required as a matter of law to draw that inference, it is generally allowed to do so; and a guilty verdict returned by a properly instructed jury on the basis of such evidence may not be set aside.

ARGUMENT

THE FEDERAL GRATUITIES STATUTE, 18 U.S.C. 201(c)(1)(A), PROHIBITS THE GIVING OF THINGS OF VALUE TO A FEDERAL OFFICIAL IF, BUT ONLY IF, THE GIFTS ARE MOTIVATED BY OFFICIAL ACTS PERFORMED BY THE RECIPIENT IN THE PAST OR BY THE RECIPIENT'S CAPACITY TO PERFORM SUCH ACTS IN THE FUTURE

This Court granted certiorari on the following question: "Is the requirement in 18 U.S.C. Sec. 201(c)(1)(A) that a thing of value be given 'for or because of any official act' satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position?" 119 S. Ct. 402 (1998). That question cannot be answered with an unqualified "yes," at least if the term "official position" is understood to mean "official

title" or "official status." If a donor gives things of value to a government officer or employee because of the recipient's official status, but remains indifferent as to the manner in which the recipient's official duties are performed, the gifts would not be "for or because of any official act" within the meaning of Section 201(c)(1)(A). Gifts of that nature do not present the dangers at which the gratuities statute aims, and exclusion of such gifts from the scope of the statutory ban is consistent with the statutory language as well as its underlying purpose.

The "official act" requirement, however, must be understood in light of two related legal rules that govern its scope and application. First, a gift need not be linked to a specifically identified governmental action in order to fall within Section 201(c)(1)(A). Gifts that are intended to reward favorable official treatment in the past, or to increase the likelihood of such treatment in the future, are properly regarded as having been made "for or because of any official act." Second, the requisite intent may be established in a Section 201(c)(1)(A) prosecution (as in any other judicial proceeding) by circumstantial evidence. Thus, where a thing of value is provided to a government official having authority to act in matters affecting the donor's interests, the jury may properly infer that the gift is intended to reward or influence some (identified or unidentified) official act, even in the absence of direct evidence that such a purpose exists.

A. Section 201(c)(1)(A) Does Not Prohibit Gifts Motivated By The Recipient's Official Status Or Title If The Donor Is Indifferent As To The Manner In Which The Recipient's Governmental Power Is Exercised

Not all gifts to a government official that are motivated by the official's position violate the gratuities statute It is possible to imagine situations in which a donor may give things of value to a government officer or employee because of the recipient's official status or title, while remaining indifferent as to the manner in which the recipient's official duties are performed. For example, "it is conceivable that someone might give gifts to a high official simply to create the impression that he is a 'big shot' or 'insider,' without regard to how the official wields his power." Pet. App. 34 (Wald, J., concurring in the denial of rehearing en banc). Or a wealthy parent might provide financial assistance to a child who had accepted a low-paying government job in order to encourage the child to continue performing work that the parent regarded as admirable. Cf. *Crandon* v. *United States*, 494 U.S. 152, 175 (1990) (Scalia, J., concurring in judgment). Personal friends of a newly appointed high-level government official might organize a dinner, or contribute towards a gift, in order to celebrate the appointment. In each of those situations the gift would be made "because of" the recipient's official position, in the sense that the same gift would not be offered if the recipient were not a government officer or employee. Unless the gift is given with a view towards the *manner* in which official power or influence is (or is expected to be) exercised, however, the gift cannot plausibly be regarded as one made "for or because of any official *act*." 18 U.S.C. 201(c)(1)(A) (emphasis added).

As the court of appeals acknowledged (Pet. App. 11), some courts have framed the inquiry under Section 201(c)(1) as whether things of value were provided because of the recipient's official "position." See *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir.) ("under the unlawful gratuity subsection all that need be proven is that the official accepted, because of his position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty'"), cert. denied, 439 U.S. 870 (1978); *United States* v. *Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) (en banc) ("All that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of [the recipient's] official position, and not solely for reasons of friendship or social purposes"), aff'd on other grounds, 447 U.S. 10 (1980); *United States* v. *Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986) ("The purpose of [the gratuities statute] is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position."), cert. denied, 484 U.S. 815 (1987); cf. *United States* v. *Bustamante*, 45 F.3d 933, 940 (5th Cir.) (under the gratuities statute, "no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office"), cert. denied, 516 U.S. 973 (1995).

None of the cases cited above, however, specifically addresses the question whether Section 201(c)(1) is violated where a gift is motivated by the recipient's official status or title but the donor is indifferent as to the manner in which official power or influence is exercised. Rather, in each of those cases the donor possessed an evident interest in favorable treatment from the official to whom the gratuity was given. See

Evans, 572 F.2d at 481-482; *Standefer*, 610 F.2d at 1078; *Gorman*, 807 F.2d at 1305; *Bustamante*, 45 F.3d at 941. Those courts appear to have used the word "position" essentially to mean "capacity to render favorable treatment." Compare Pet. App. 34 (Wald, J., concurring in the denial of rehearing en banc) ("in the case of a regulated entity," it is likely "that inherent in an official's 'position' is his capacity to perform regulatory acts which will affect the gift-giver"); *United States* v. *Alessio*, 528 F.2d 1079, 1082 (9th Cir.) (rejecting sufficiency-of-the-evidence challenge to a donor's conviction under the gratuities statute because "[t]he jury could properly conclude from the testimony at trial that [the donor] knew [the recipient] was in a position to use his authority in a manner which would affect the conditions of confinement of [the donor's] father."), cert. denied, 426 U.S. 948 (1976).

As we explain below (see pp. 18-20, *infra*), a conviction under the gratuities statute does not require proof that the gift in question was earmarked for any specifically identified official act. It is sufficient to show that the gift was motivated by the recipient's perceived *capacity* to assist the donor through the exercise of his official power or influence, even if the particular acts that might affect the donor's interests "are neither specified nor even known at the time of the gift." Pet. App. 34 (Wald, J., concurring in the denial of rehearing en banc). It is clear, however, that Section 201(c)(1)(A) does not prohibit a donor from giving a thing of value to a government official if the gift is motivated by reasons (most obviously, personal friendship) unrelated to the actual or potential exercise of governmental power or influence. The statute requires proof that the gift is provided "for or because of any official act."

In stating that Section 201(c)(1)(A) prohibits gratuities given because of an official's "position," the courts of appeals appear simply to have recognized that the correct interpretation of that Section lies between the extremes described above. The government is not required to prove that a gratuity was linked to a specifically identified official act; but it is required to show that the gift was motivated, at least in part, by the recipient's capacity to exercise governmental power or influence in the donor's favor. That approach represents an appropriate reading of the statute. To say that a donor has given things of value because of the recipient's capacity to perform official acts favorable or unfavorable to the donor is equivalent, in practical effect, to saying that the gratuities have been given because of the acts that the recipient is capable of performing.

The term "position" is overbroad insofar as it would literally cover the hypothetical circumstance (see p. 14, *supra*) in which a gift is motivated by the recipient's status or title even though the donor is unconcerned with the manner in which official power or influence is exercised. The defendants in the cases cited above, however, do not appear to have suggested that such a benign motive animated *their* conduct or that the jury instructions would have permitted conviction based solely on an "official status or title" theory. Given the questions actually before those courts, use of the term "position" as a synonym for "capacity to act" was not an unnatural way of communicating the applicable legal standard.

B. Section 201(c)(1)(A) Does Not Require The Government To Prove A Nexus Between A Gratuity And A Specifically Identified Official Act

In the court of appeals, respondent argued that the indictment should have been dismissed because Section 201(c)(1)(A) "requires the government to prove a nexus between each unauthorized gift and some specifically identified official act—performed or hoped to be performed—for which the gift was given." Pet. App. 4; see also *id.* at 38 (respondent moved in district court to dismiss the indictment on the ground that it "d[id] not allege that [respondent] provided things of value to reward Secretary Espy for ā specific act he had already performed or was already committed to perform"). The courts below correctly rejected that contention. See *id.* at 13-14, 42-44. Such a requirement is not supported by the text of Section 201(c)(1)(A),[5] and it would substantially undermine enforcement of the gratuities ban.

Where a federal official has a continuing capacity to act on matters that will affect a particular entity, the regulated party has an obvious interest in keeping the public official favorably disposed as a general matter, regardless of the outcome of any particular decision. The generation and maintenance of such official goodwill falls within the statute, for ultimately a favorable

[5] The level of intent required under Section 201(c)(1) does not rise to the level required under the bribery statute, 18 U.S.C. 201(b). Criminal liability under the bribery statute requires proof of a quid pro quo between the donor and the recipient, see *United States* v. *Niederberger*, 580 F.2d 63, 68 (3d Cir.), cert. denied, 439 U.S. 980 (1978); *United States* v. *Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974), though it does not require proof that the officer or employee who received the bribe actually performed the official act contemplated in the illicit agreement, see *United States* v. *Brewster*, 408 U.S. 501, 525-527 (1972).

attitude may be manifested in specific official acts. If a gift to a public official is motivated by a desire to influence the official's performance of his governmental responsibilities, the gift is therefore properly characterized as one made "for or because of any official act performed or to be performed by" the recipient, 18 U.S.C. 201(c)(1)(A), whether or not the donor has a particular act in mind at the time the gift is made.[6] Similarly, Section 201(c)(1)(A) applies to gifts made for the purpose of obtaining "insurance" against unfavorable governmental action, even where it is not clear that the recipient will ever be in a position to affect the donor's interests. For example, if an organized crime figure furnishes gifts to a United States Attorney, hoping that the United States Attorney will decline prosecution (or prosecute less vigorously) in the event that the donor or one of his subordinates comes to the attention of law enforcement authorities, the gifts would be made "for or because of" (potential) official action.[7]

Like other federal bribery and conflict-of-interest laws, the gratuities ban is grounded in "[t]he principle * * * that a public servant owes undivided loyalty to

[6] We address in this context appointed officials and do not address separate issues that may be raised in cases involving the provision of things of value to elected officials. Cf. *Brewster*, 506 F.2d at 73 n.26, 76-78.

[7] The term "official act" is broadly defined to include "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, *or which may by law be brought before any public official, in such official's official capacity.*" 18 U.S.C. 201(a)(3) (emphasis added). The italicized language supports the view that the term extends beyond specifically identified official actions and encompasses the full range of governmental conduct in which the federal officer or employee is *authorized* to engage.

the Government." H.R. Rep. No. 748, 87th Cong., 1st Sess. 3 (1961) (discussing predecessor versions of conflict-of-interest statutes and stating that the principle of undivided loyalty "is as important today as when the first of these statutes was enacted more than a century ago"). Gifts intended to improve the "attitude" of a government official towards a regulated entity, or to enhance the official "relationship" between the two, are inconsistent with that principle of undivided allegiance. If the purpose of such a gratuity is to increase the ultimate likelihood of some official action favorable to the donor, the fact that the donor has no specific official act (or a wide variety of specific official acts) in mind at the time of the gift does not alter the fundamental illegitimacy of that goal. As the court of appeals recognized, "[t]hat an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute—as long as the jury is required to find the requisite intent to reward past favorable acts or to make future ones more likely." Pet. App. 13-14; see also pp. 15-17, *supra*.[8]

[8] Some language in the court of appeals' opinion in this case comes close to suggesting that Section 201(c)(1)(A) requires proof of a nexus to an identified official act. Taken as a whole, however, the opinion is consistent with our approach. The court did state that "a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts." Pet. App. 8. But the court did not hold that that scenario exhausts the reach of the statute. In rejecting respondent's challenge to the indictment, the court correctly indicated that a gift motivated by the hope of generally favorable future official treatment would run afoul of Section 201(c)(1)(A). *Id.* at 13-14. Likewise, Judge Wald's opinion concurring in the denial of rehearing en banc stated that she "read[s] the panel decision as requiring only that the gifts be tied to some future acts by the official, even if those acts are neither specified nor even known at the time of the gift; this case does not hold that the prosecutor must establish that particular gratuities were given to influence particular official acts." *Id.* at 34.

C. The State Of Mind Of A Donor In A Section 201(c)(1)(A) Prosecution, Like Any Other Element Of A Criminal Offense, May Be Proved By Circumstantial As Well As By Direct Evidence

The question whether a gift was given "for or because of any official act" goes to the state of mind of the donor. Even if the donor is subject to the regulatory authority of the recipient, or may otherwise be affected by the recipient's official conduct, a gift does not violate Section 201(c)(1)(A) if it is motivated by reasons (*e.g.*, personal friendship) unrelated to the actual or potential exercise of governmental power or influence. Thus, the fact that a Cabinet Secretary may have matters before him that could affect a donor's business interests does not, in and of itself, establish as a matter of law that a gift to the Secretary violates Section 201(c)(1)(A). Rather, the jury must conclude that the recipient's capacity to exercise official power or influence served, at least in part, as the motivation for the gift.

It is well established, however, that

> [b]ecause intent is formed in the mind in secrecy and silence and the human mind functions at a speed impossible to measure, a determination of whether a deliberate intent was formed must be drawn from all the circumstances of the case. Circumstantial evidence of this subjective fact is therefore indispensable. Circumstantial evidence is as persuasive as direct evidence. With each, triers of fact must use their experience with people and events to weigh probabilities.

Mallette v. *Scully*, 752 F.2d 26, 32 (2d Cir. 1984) (citation omitted). Accord, *e.g.*, *United States* v. *Jones*, 16 F.3d 275, 278 (8th Cir. 1994); *United States* v. *Macko*, 994 F.2d 1526, 1533 (11th Cir. 1993); *United States* v. *Hudson*, 717 F.2d 1211, 1213 (8th Cir. 1983); *United States* v. *Beck*, 615 F.2d 441, 449 (7th Cir. 1980). This Court has recognized, for example, that while knowledge of likely anticompetitive effects is a necessary element of a criminal antitrust violation, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443-444 (1978), "an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted," *id.* at 446. See also, *e.g.*, *Cheek* v. *United States*, 498 U.S. 192, 203-204 (1991) (where knowledge of illegality is an element of a criminal tax violation, the unreasonableness of a defendant's purported opinion that his conduct was lawful may cause the jury to conclude that the opinion was not sincerely held); *United States* v. *Ocampo-Guarin*, 968 F.2d 1406, 1410 (1st Cir. 1992) (intent to distribute narcotics may be inferred from the quantity of drugs involved).

In light of the jury's authority to infer intent from surrounding circumstances, where a thing of value is given to a government official who has authority to act in matters affecting the donor's interests, the jury should generally be permitted to infer, based on that relationship alone, that the gift was made "for or because of" the potential future exercise of official power or influence. The defendant in such a case is entitled to argue to the jury that the gift was made for reasons unrelated to any actual or potential official conduct. But while the jury may not be required as a matter of law to infer that the gift was made "because of" the official's capacity to exercise governmental

power, it is generally allowed to do so; and a guilty verdict returned by a properly instructed jury on the basis of such evidence may not be set aside. Compare *United States Gypsum Co.*, 438 U.S. at 446; *Morissette* v. *United States*, 342 U.S. 246, 276 (1952).

CONCLUSION

For the reasons stated above, 18 U.S.C. 201(c)(1)(A) prohibits the giving of things of value to federal officials if, but only if, the gifts are motivated by official acts performed by the recipient in the past or by the recipient's capacity to perform such acts in the future.

Respectfully submitted.

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